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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
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3 ATHANASIOS DRENIS, et al.,

4 Plaintiffs,

5 v.

04 CV 9263 (LAP)

6 ANGELO HALIGIANNIS, et al.,

7 Defendants.

8 -----x

New York, N.Y.  
May 7, 2014  
3:15 p.m.

9  
10 Before:

11 HON. LORETTA A. PRESKA,

12 District Judge

13 APPEARANCES

14 LERNER ARNOLD & WINSTON, LLP

15 Attorney for Plaintiffs Drenis, et al.

16 CHARLES ARNOLD

17 ANTHONY PEARL

Attorney for Defendant Stuart Adler

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(In open court)

THE COURT: We're here today on plaintiffs' motion for a default judgment against Mr. Adler.

Mr. Adler and counsel have put in affidavits essentially arguing that proper service was not made on Mr. Adler.

The general fact pattern is that Mr. Adler was named in the first amended complaint. He appeared through counsel and filed a motion to dismiss. On or about September 26 of 2006, Judge Holwell dismissed the action as premature without prejudice and granted plaintiffs' leave to replead.

In that first amended complaint, Mr. Adler was included in the fraudulent conveyance claim. Thereafter, a second amended complaint was served on Mr. Adler at the same Flower Lane address as the first amended complaint had been served.

In that complaint, Mr. Adler was included in the accounting cause of action and the fraudulent conveyance cause of action. Mr. Adler did not appear with respect to the second amended complaint.

The third amended complaint was served by mailing to Mr. Adler's business address, which he acknowledges was and is his business address, at One Old Country Road. In that complaint, Mr. Adler was included in the accounting and the fraudulent conveyance schemes.

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1           As set forth in Mr. Adler's affidavit, at the time of  
2 the second amended complaint, he did not live at the Flower  
3 Lane address, although, apparently, he has returned to that  
4 address as of today. Mr. Adler doesn't say where he was living  
5 at the time of the service of the second amended complaint, but  
6 he does not deny receiving any of the three complaints that are  
7 at issue here.

8           Rule 5(a)(1)(B) states that "[u]nless these rules  
9 provide otherwise, each of the following papers must be served  
10 on every party: ... a pleading filed after the original  
11 complaint unless the court orders otherwise under Rule 5(c)  
12 because there are numerous defendants."

13          Rule 5(a)(2) states that "[n]o service is required on a  
14 party who is in default for failing to appear. But a pleading  
15 that asserts a new claim for relief against such a party must  
16 be served on that party under Rule 4."

17          Rule 5(b)(2)(C) states, "A paper is served under this  
18 rule by: ... mailing it to the person's last known address - in  
19 which event service is complete upon mailing."

20          In *O'Callaghan v. Sifre*, 242 F.R.D. 69 (S.D.N.Y.  
21 2007), Judge Marrero considered a case where the initial  
22 complaint was dismissed without prejudice and with leave to  
23 replead. The Court, however, directed the clerk of court to  
24 close the file. Thereafter, when Judge Marrero accepted the  
25 amended complaint, the clerk was ordered to reopen the file.

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1           In that case, Judge Marrero held that service of the  
2 amended complaint under Rule 4 was not required. He stated,  
3 quote, "Where a federal court grants a plaintiff leave to file  
4 an amended pleading in a prior-commenced case, the plaintiff  
5 does not need to serve that amended pleading pursuant to the  
6 requirements of Rule 4, unless the amended pleading includes  
7 'new or additional claims for relief.'" *Id.* at 73. (citing  
8 Fed. R. Civ. P. 5(a)) (other citations omitted).

9           I cite *O'Callaghan* for the proposition that service  
10 under Rule 4 ordinarily is not required for amended complaints.  
11 To the extent that *O'Callaghan* suggests that service under Rule  
12 4 is required for all amended pleadings that add "new or  
13 additional claims for relief," I note that this was not  
14 essential to the holding of *O'Callaghan*, which considered an  
15 amended complaint that was identical to the initial complaint.  
16 See *O'Callaghan*, 242 F.R.D. at 74.

17           Also, as I note below, Rule 5(a)(2) only requires  
18 service under Rule 4 for complaints that add "new or additional  
19 claims for relief" against a party "in default for failing to  
20 appear" in response to the previous complaint. Although  
21 plaintiffs added an additional claim for relief to the second  
22 amended complaint in this case, Mr. Adler did not default on  
23 the first amended complaint. Accordingly, I find that service  
24 under Rule 4 was not required for the second amended complaint.

25           To the extent that Mr. Adler argues that service of

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1 the second amended complaint was insufficient because he was no  
2 longer living at the Flower Lane address, that argument is  
3 rejected as well. In so doing, I rely on *Sanders v. New York*  
4 *City Department of Corrections*, 376 Fed. Appx. 151 (2d Cir.  
5 2010). There, in discussing service under Rule 5, the Court  
6 said, "Federal Rule of Civil Procedure 5 provides that a party  
7 may serve a 'written motion' by 'mailing it to the person's  
8 last known address – in which event service is complete upon  
9 mailing.' Federal Rules of Civil Procedure 5(a)(1)(D),  
10 (b)(2)(C). Although the City Defendants' first service was  
11 made by mailing the papers to an older address for Sanders, the  
12 City Defendants filed an amended declaration of service after  
13 mailing the papers to Sanders' correct last known address. The  
14 second service therefore complied with Rule 5.

15 "This Court has recognized that, in the context of  
16 notice to parties of court actions and proceedings, "[t]he  
17 proper focus of the due process inquiry is not whether notice  
18 ... was actually received but whether the means selected were  
19 'such as one desirous of actually informing the [litigant]  
20 might reasonably adopt to accomplish it.'" *Grievance Comm. v.*  
21 *Polur*, 67 F.3d 3, 6 (2d Cir. 1995) (quoting *Mullane v. Cent.*  
22 *Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 94  
23 L.Ed. 865) (1950)). Here, the means selected by City  
24 Defendants – mailing the motion papers to Sanders' last known  
25 address – were reasonably calculated to provide Sanders with

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1 actual notice of the motion and, thus, they also satisfied the  
2 requirements of due process."

3 Here, the means selected by plaintiffs, that is,  
4 mailing the second amended complaint to Mr. Adler's last known  
5 address, were reasonably calculated to provide him with actual  
6 notice. As I noted above, Mr. Adler does not deny receiving  
7 actual notice.

8 Finally, to the extent that Mr. Adler claims that the  
9 service of the third amended complaint on his One Old Country  
10 Road business address is insufficient, I reject that argument  
11 as well.

12 In footnote five to *O'Callaghan v. Sifre*, (*supra*), the  
13 Court noted, "Rule 5(b)(2)(B) does not specify whether the  
14 'last known address' referred to in this provision must be a  
15 residential address, or may be a business address. In the  
16 absence of limiting language, the Court concludes that it may  
17 be either, and further accepts that, in this case, Defendants  
18 may be served at their places of business, as specified by  
19 them." Accordingly, I find that service of the third amended  
20 complaint on Mr. Adler was sufficient. I also note that  
21 Mr. Adler does not deny receiving a copy of the third amended  
22 complaint.

23 To the extent that Mr. Adler argues that Rule 5(a)(2)  
24 requires service under Rule 4 because the second amended  
25 complaint added a new claim against him, that argument is

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1 rejected as well. The second sentence of that rule stating  
2 that, "A pleading that asserts a new claim for relief against  
3 such party must be served on that party under Rule 4," clearly  
4 refers back to the first sentence, which addresses a party who  
5 is in default.

6 As noted above, Mr. Adler was not in default of the  
7 first amended complaint. He appeared and made a motion to  
8 dismiss. Accordingly, service under Rule 4 was not required by  
9 Rule 5(a)(2), even though a new claim for relief was added  
10 because Mr. Adler was not in default.

11 Accordingly, plaintiffs' motion for a default judgment  
12 against Mr. Adler is granted. Plaintiffs' counsel shall confer  
13 with Mr. Adler's counsel with respect to a proposed order and  
14 submit one to the Court.

15 Thank you, counsel, for your assistance.

16 MR. ARNOLD: Thank you, Judge.

17 MR. PEARL: Thank you, your Honor.

18 (Adjourned)  
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